SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JAMES D'AUGUSTE** **PART** **55**

Justice

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DEAN FOCARILE,

Plaintiff,

- v -

G.A. WINDOWS INC. D/B/A ADLER WINDOWS, WA WA WINDOWS INC., GARY ADLER, ROSS ADLER, BLUE WOODS MANAGEMENT GROUP INC.,720 WEST 173RD STREET OWNERS CORP.

Defendants.

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INDEX NO. 151894/2018

MOTION DATE N/A

MOTION SEQ. NO. 003

AMENDED DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 101, 103, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159

were read on this motion and x-motion to/for SUMMARY JUDGMENT.

In this personal injury action alleging negligence and violations of the Labor Law in which a part of a window from 720 West 173rd Street, New York New York (the "building"), allegedly fell upon and struck plaintiff while walking on the sidewalk below, plaintiff seeks an order pursuant to CPLR 3212 granting plaintiff summary judgment on the issue of liability (1) against the alleged supplier and installer of the subject window, G.A. Windows, Inc., d/b/a Adler Windows, Gary Adler, individually and d/b/a Adler Windows, Ross Adler, individually and d/b/a Adler Windows, Gary Adler and Ross Adler d/b/a Adler Windows (collectively the "Adler defendants"), on the grounds that the Adler defendants are negligent as a matter of law for causing an object to fall and strike plaintiff; and (2) against the Adler defendants, defendant Blue Woods Management Group, Inc, and defendant 720 West 173rd Street Owners Corp., on the grounds that all of the defendants were negligent as a matter of law for failing to protect plaintiff from hazards

posed by falling objects. The Adler defendants cross-move for an order pursuant to CPLR 3212 granting dismissal of 720 West and Blue Woods' cross-claims for common law indemnification and breach of contract. 720 West and Blue Woods cross-move for an order pursuant to CPLR 3212 granting them summary judgment on their claims for common law indemnification and breach of contract against the Adler defendants.

Defendant 720 West 173rd Street Owners Corp. is the owner of the building and defendant Blue Woods Management Group, Inc. was hired by 720 West to manage that building. Defendant Adler Windows is in the business of supplying and installing windows into both existing and new buildings. Adler Windows was contracted by 720 West and Blue Woods to do a full building-wide replacement of the windows at the property, which were originally installed in 1920.

On July 21, 2017, plaintiff was a pedestrian walking on the sidewalk adjacent to the building. There is no dispute that the capping from one of the newly installed windows fell from the building. However, the parties sharply dispute whether the capping struck the plaintiff or struck the ground missing plaintiff entirely. Further, the parties do not dispute that the Adler defendants supplied and installed the subject window with the window capping. However, the Adler defendants dispute whether they caused the falling of the capping, either by way of negligent installation, or through one of its employees otherwise causing the capping to fall. Defendants also dispute which among them, if any, were responsible for providing adequate sidewalk protections for pedestrians and whether they negligently failed to do so.

Plaintiff's Labor Law Claim

Plaintiff concedes in his reply papers that the Labor Law does not apply to his accident as he was a pedestrian and not a worker at a construction site. Accordingly, this cause of action is dismissed.

Plaintiff's Negligence Claims

Plaintiff asserts that the Adler defendants are liable for causing the object to fall, directly injuring the plaintiff under the doctrine of *res judicata*. Plaintiff also asserts that Adler defendants are liable for setting up inadequate pedestrian protections in the form of warning cones and caution tape. Plaintiff further asserts that Blue Woods, as the statutory agent for 720 West, and 720 West, as owners of the premises, are liable for having actual notice of the inadequate warning defect. Finally, plaintiff further asserts that all three defendants are negligent per se for failing to comply with (1) Section 3306.1 of the 2015 New York State Building Code regarding the protection of pedestrians during construction activities, (2) Section 23- 1.33 of Title 12 of the N.Y. Comp. Codes R. & Regs. regarding the protection of pedestrians during construction activities, and (3) Section 3307.6 of the New York City Building Code regarding the protection of pedestrians in the form of the installation of sidewalk sheds.

Initially, plaintiff asserts that the doctrine of *res ipsa loquitor* requires summary judgment in his favor as against the Adler defendants. The doctrine of *res ipsa loquitur* allows an inference of negligence to be drawn from the mere happening of an accident. To invoke the doctrine of *res ipsa loquitur*, a plaintiff must establish the following three elements: (1) the event must be of a kind that does not ordinarily occur in the absence of negligence, (2) it must be caused by an instrumentality within the exclusive control of the defendant, and (3) plaintiff must not have affected the happening of the event by any voluntary action. *See Corcoran v. Banner Super Market, Inc*., 19 N.Y.2d 425, 430 (1967). Assuming the accident occurred in the manner asserted by plaintiff then the plaintiff would meet his burden of demonstrating an entitlement to judgment under the doctrine of *res ipsa loquitur*. The Adler defendants were solely responsible for supplying and installing the windows, which includes the window capping, and that no other contractors or

workers were involved in the installation. Moreover, the speculation that it is possible that the mere opening of a newly installed window by a tenant might cause a piece of that window to come crashing down on either the street or a pedestrian below still points to liability by the Adler defendants.

Nonetheless, plaintiff is not entitled to summary judgment on the issue of liability as plaintiff has not demonstrated that defendant's arguable negligence was the proximate cause of any injuries he suffered. While plaintiff has submitted evidence in support of his contention that the window capping stuck him, defendants have submitted admissible evidence showing that the window capping missed plaintiff and instead struck the ground near plaintiff. In support of this position, defendants submit the testimony of Edgar Mundo, an employee of Blue Woods, and Gilberto Cotto, an employee of Adler. Mundo testified that he personally watched the capping fall from the building and followed its path to the ground where it struck the floor without hitting plaintiff.[1] Plaintiff's assertion that other portions of Mundo's testimony is more equivocal goes to the weight of the evidence, which is required to be viewed in the light most favorable to the defendants as the non-moving parties. Moreover, Cotto testified that plaintiff admitted at the time of the incidents that the window capping did not hit him. This is allegedly shown when the plaintiff complained to Cotto that the window capping "almost" hit him, which would be inconsistent with an assertion of an object hitting him.[2] As with Mundo, challenges to the credibility of these two witnesses must await trial but these two witnesses is sufficient to raise triable issues of fact as to

[1] To wit, at p. 67 of Mundo's deposition: "Q: Did you see the piece of capping hit the ground? A: Yes. Q: Where did you see it land? A: Where? Q: Yes. A: Next to the cones." At p. 78, Mr. Mundo further states: "Yeah, he was -- okay, when the piece fell down and hit the floor, so he [plaintiff] continues walking."
[2] To wit, at pages 31-32 of Cotto's deposition: "He told me that we needed to be careful, that the cap had almost hit him. And I told him it wasn't me, I bring it to the guy's attention upstairs."

whether or not the falling piece of window capping hit the plaintiff. Accordingly, plaintiff's motion for summary judgment on his negligence causes of action is denied.

The existence of a sharp issue of fact on a central issue of negligence also precludes the granting of summary judgment for negligence liability under the assertion that defendants provided inadequate warnings. Nonetheless, the Court will address plaintiff's assertion that all three defendants are negligent per se for failing to comply with (1) Section 3306.1 of the 2015 New York State Building Code regarding the protection of pedestrians during construction activities, (2) Section 23- 1.33 of Title 12 of the N.Y. Comp. Codes R. & Regs. regarding the protection of pedestrians during construction activities, and (3) Section 3307.6 of the New York City Building Code regarding the protection of pedestrians in the form of the installation of sidewalk sheds.

Section 3306.1 of the 2015 New York State Building Code and Section 23- 1.33 of Title 12 of the N.Y. Comp. Codes R. & Regs. regarding the protection of pedestrians during construction activities do not apply to construction in New York City. Accordingly, plaintiff's motion for summary judgment asserting violations of these provisions is denied. Section 3307.6 of the New York City Building Code, however, regarding the protection of pedestrians in the form of the installation of sidewalk sheds does apply to the accident site.

New York City Building Code Section 3307.6.2 (the "Building Code") provides in pertinent part that a sidewalk shed is required:

> "When a portion of a facade over 40 feet (12 192 mm) above curb level is to be constructed, altered, maintained, or repaired, or a vertical or horizontal enlargement is to occur at a height over 40 feet (12 192 mm) above curb level, and the sidewalk, walkway, or pathway is within a perpendicular distance from the structure that is equal to or less than half the height of such facade work or vertical or horizontal enlargement. The sidewalk shed shall be installed prior to the commencement of work at a height greater than 40 feet (12 192 mm) above curb level. Such shed shall not be removed until the building is enclosed, all exterior work has been completed and the sash is glazed above the second story, the facade has been cleaned down,

> and all exterior chutes, scaffolds, mast climbers, and hoisting equipment have been dismantled and removed from the site."

New York City Building Code § 3307.6.2(2)(Protection of Pedestrians)(2014). It is undisputed that the window replacement project applied to the entire 6-story building, which included work above the height threshold stated in the Building Code. It is also undisputed that no shed was provided.

Defendants 720 West and Blue Woods assert that to the extent that the Building Code applied, they were not responsible because the Adler defendants advised that no such sheds were necessary on the project. Even if true that the Adler defendants made such representations, such reliance is not a defense to non-compliance of these safety regulations. Accordingly, plaintiff's motion for summary judgment is granted on the issue of whether defendants 720 West and Blue Woods were negligent in failing to provide a safety shed.

The Adler defendants contend that even if the Building Code applied, they cannot be held responsible for the lack of pedestrian safety sheds because the contract expressly stated the Adler defendants were not responsible for scaffolding. The Court disagrees. Even if it was the responsibility of the owner and agent defendants (720 West and Blue Woods) to construct scaffolding or a shed (assuming arguendo that the shed constitutes scaffolding), the Adler defendants had a responsibility to not to engage in work that required such safety precautions. The fact that it may have been another party's responsibility to ensure compliance by constructing this safety device does not create immunity for the Adler defendants who engaged in work requiring such protections. Accordingly, plaintiff's motion for summary judgment is granted on the issue of whether defendant Adler was negligent in failing to provide a safety shed.

Accordingly, while the plaintiff is not being granted summary judgment on the issue of liability, if the accident occurred in the manner he asserts then defendants were negligent per se

for violating New York City Building Code § 3307.6.2(2)(Protection of Pedestrians)(2014) in relation to safety shed requirements.

Defendants' Cross-Claims

There is no express indemnification provision contained in the contract between Blue Wood and Adler related to the window replacement project. Indemnity contracts are to be strictly construed to avoid reading into them duties that the parties did not expressly intend. *See Great N. Ins. Co. vs. Interior Constr. Corp*., 7 N.Y.3d 412 (2006); and *Tonking vs. Port Auth. of N.Y. & N.J.*, 3 N.Y.3d 486 (2004). Without evidence of any indemnification language in the contract for the subject work, neither 720 West nor Blue Woods has a basis upon which to assert their claim for contractual indemnity. The lack of any such language necessitates dismissal of the contractual indemnity claim against the Adler defendants. Thus, Adler is entitled to summary judgment dismissing 720 West and Blue Woods's cross-claims for contractual indemnification is granted and such cross-claims are dismissed.

Next, any claim for common law indemnification and contribution claim must await an outcome of the trial of this action. Finally, 720 West's and Blue Woods' cross-claims for common law indemnification and contribution against the Adler defendants are also denied as this issue will have to await the outcome of the trial in this action. The issue of a failure to procure insurance must also await trial.

Accordingly, plaintiff's motion for summary judgment is denied as to the issue of liability but is granted to the extent of providing him summary judgment on the issue of defendants' negligence with the issue of proximate cause remaining to be resolved at trial, and the cross-motions relating to indemnification and contribution is granted solely to the extent of dismissing the claim for contractually indemnification and otherwise denied.

This constitutes the decision and order of this Court.

03/22/2022
DATE

JAMES D'AUGUSTE, J.S.C.

CHECK ONE:		**CASE DISPOSED**		X	**NON-FINAL DISPOSITION**		
		GRANTED	**DENIED**		**GRANTED IN PART**	X	**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**